

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 319 of 1983
WITH
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For Approval and Signature:

Hon'ble MR.JUSTICE H.L.GOKHALE

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1. Whether Reporters of Local Papers may be allowed
to see the judgment ?
2. To be referred to the Reporter or not ?
3. Whether their Lordships wish to see the fair copy
of judgment?
4. Whether this case involves a substantial question
of law as to the interpretation of the
Constitution of India, 1950 or any order made
thereunder?
5. Whether it is to be circulated to the Civil
Judge?

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JAMALBHAI NURBHAI

Versus

ALLARAKHA RAHIMBHAI (DIED)

Appearance:

MR NK MAJMUDAR FOR MR PB MAJMUDAR for Petitioners
NOTICE SERVED for Respondent No. 1

CORAM : MR.JUSTICE H.L.GOKHALE

Date of decision: 18/08/98

ORAL JUDGEMENT

The petitioner in Civil Revision Application No.319 of 1983 claims to be a tenant of the respondents who own the concerned plot of land bearing survey no.171 situated in Dariapur locality of City of Ahmedabad. The respondents are the trustees of Kagdi Masjid Trust which is registered with the Charity Commissioner. The petitioner filed a suit for the aforesaid declaration being H.R.P. Suit No.1466 of 1975 in the Court of Small Causes at Ahmedabad. The respondents/defendants amongst others pleaded that the plaintiff is a trespasser and pointed out that the respondents had already filed one suit in the City Civil Court at Ahmedabad being City Civil Suit No.711 of 1961 for a declaration that the plaintiff was a trespasser and that the said suit had been decreed in favour of the respondents herein and that the said decree had been confirmed by the High Court and the appeal therefrom was also not entertained by the Honourable Supreme Court.

2 The learned judge of the Small Causes framed various issues. Amongst others, issue no.2 was as to whether the suit was barred by res judicata, whereas issue no.1 was as to whether the plaintiff proves that he is a lawful tenant and is protected by the Rent Act. The learned judge gave a finding that the suit was barred by res judicata in view of the decision rendered in the earlier suit being City Civil Suit No.711 of 1961 by the City Civil Court, Ahmedabad. He, however, went into the evidence and also came to the conclusion that the plaintiff/petitioner herein had failed to prove that he was lawful tenant, protected by the Bombay Rents, Hotel and Lodge House Rates (Control) Act, 1947 (hereinafter to be referred to as the Bombay Rent Act). Being aggrieved by that judgement and order, the petitioner in Civil Revision Application No.319 of 1983 filed an appeal under section 29 of the Bombay Rent Act to the appellate bench of the Court of Small Causes at Ahmedabad. The appellate bench framed necessary issues. There also, the first issue raised was as to whether the learned trial judge erred in holding that the plaintiff's suit was barred by res judicata whereas the second issue was as to whether the learned trial judge erred in dismissing the plaintiff's suit in question. The appellate bench gave a finding in favour of the petitioner herein on the first issue and held that the suit filed by the petitioner herein was not barred by principle of res judicata. The bench however held that there was no error in dismissing the plaintiff's suit on merits. It therefore dismissed the appeal. Being aggrieved by both these judgements and orders this revision has been filed.

3 Civil Revision Application No.320 of 1983 arises out of a civil suit filed by the petitioner therein who is situated identical to the petitioner in Civil Revision Application No.319 of 1983. He had filed a similar suit being HRP Suit No.1464 of 1975 in the Court of the Small Causes. Therein also similar defence was taken and the similar judgement and order followed. He filed an appeal therefrom to the Court of the Small Causes and on the same being rejected, he had filed this Civil Revision Application No.320 of 1983. Civil Revision Application No.321 of 1983 arises out of a civil suit filed by the petitioner therein being HRP Suit No.1463 of 1975 in the Court of the Small Causes. Therein also similar defence was taken and the similar judgement and order followed. He had filed an appeal therefrom to the Court of the Small Causes and on the same being rejected, he filed this Civil Revision Application No.321 of 1983.

4 All these petitions raise common points and hence they are being heard together. Shri N.K. Majmudar has appeared for the petitioners in all these matters. None has appeared for the respondents though served. The first submission of Mr Majmudar was that finding of the appellate court on the first point raised before it was correct. He submitted that the appellate court was right in holding that the plaintiff's suit was not barred by principles of res judicata. This submission of Mr Majmudar will be considered separately a little later. It however does not take the cause of the petitioners any further inasmuch as having held that the suits of the petitioners-plaintiffs were not barred, the appellate bench has given a finding on the second issue which is on merits of the case wherein the appellate court has held that the learned trial judge was right in dismissing the plaintiff's suit in question. The appellate bench has given its own reasons for that and when one looks to the judgement of the trial court, it is seen that although the learned judge did hold that the petitioners' suits were barred by principles of res judicata, he did go into the other issue also, namely, whether the plaintiffs proved that they are the lawful tenants, protected by the Rent Act. That was also proper from another point, namely, that as far as possible, the trial court should decide all issues which arise before a court so that there is no occasion for any remand at a later point of time. In the instant case, the plaintiffs did enter into witness box and in para 25 and 32 of the judgement of the learned trial court in HRP Suit No.1466 of 1975 there is a complete discussion with respect to evidence given by the petitioner-plaintiff. In para 32, the learned judge has discussed the evidence led by the

petitioner-plaintiff. In para 25 it can clearly be seen that the learned judge has mentioned certain circumstances found in the evidence which go against the plaintiff. The learned judge has noted that the plaintiff has not stated in the plaint as to what is the actual area of the land and what is actually let out to him. The learned judge has noted that no document was forthcoming to point out as to on what particular day and what portion of land was let out to him. The case of the petitioner was that he had been inducted into the land by one Karimabu who claimed to be the Manager of the Trust at a certain point of time. The evidence has not disclosed before the Court that Karimabu was the Manager of the Trust and had any authority to create encumbrances, even by way lease, over the land in question and hence the learned trial judge observed that in the absence of that, there will hardly be any justification to hold that the lease claimed by the plaintiff is valid. Thus, the learned judge has examined the matter on evidence led by the petitioner-plaintiff. Thus, no prejudice is caused to the petitioner-plaintiff in leading whatever evidence he wanted to lead in the suit as framed by him and thereafter on assessing that evidence, the learned trial judge came to the conclusion that the petitioner-plaintiff could not be considered to be a lawful tenant and protected by the Rent Act. This finding is as stated above, based on the evidence led by the plaintiff himself. It is no doubt true that the findings of the learned judge of the city civil court are referred to in a different context in this judgement and also in the appellate order but, the fact remains that the learned trial judge of Small Causes Court has in terms discussed the evidence of the petitioner-plaintiff on its own merits as led before him and has come to the conclusion that the petitioner-plaintiff had failed to prove that he was a lawful tenant. That finding has been left undisturbed by the appellate court. Mr Majmudar pointed out that as far as the appellate court is concerned, it has relied upon the judgement of the trial court to strengthen the view that it was taking. That apart, as stated above, the finding of the learned judge is on the independent evidence which was led before him. Hence, in the circumstances, there is no reason to interfere with the finding of the trial court as well as the appellate court on this issue.

5 The above aspect regarding the second issue on merits has been examined at the outset since on the first issue the appellate court has reversed the finding of the trial court and has held that the suit by the petitioners-plaintiffs was not barred by res judicata.

As stated above, even so on the aspect mentioned earlier, this revision must fail for the reasons given earlier. Independent of what is stated above, it is however desirable to look into this finding of the appellate court on the issue of res judicata. Mr Majmudar submitted that the said finding is proper. Section 11 of Civil Procedure Code in the substantive part states as follows:-

"11. Res judicata. No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court."

Relying upon the above provisions, Mr Majmudar submitted that in the instant case Small Causes Court was entertaining a suit under the Bombay Rent Act and the City Civil Court which decided the earlier matter should not be said to be competent to try this subsequent suit. The judgement of the appellate court has relied upon a judgement of a single judge of this Court in this behalf reported in 4 GLR 1990 in the case of AMBALAL BHAILALBHAI V. NARMADA. In that matter the respondent had initially filed Regular Civil Suit in the court of the learned Civil Judge (Junior Division) at Nadiad contending that the petitioner was a trespasser. That suit had been decreed. Subsequently, the petitioner had filed a suit against the opponents in the court of the learned Civil Judge (Senior Division) under the provisions of the Bombay Rent Act seeking a declaration that the opponent had no right to recover the possession of the suit house on the basis of the earlier decree. The contention was that the first suit was an ordinary suit cognizable by ordinary courts whereas the second suit was a special suit and it was contended that the earlier decree will not operate as res judicata. That view was accepted by the learned single judge in the above matter. In that the learned single judge held, "The finding in a previous suit cannot be res judicata in a subsequent suit which is of a different character given to it by a special law unless the previous suit also could fall within the class of suits to which the law applies. Where the first suit is an ordinary regular suit not falling under section 28 of the Bombay Rent Act and the second suit is filed in a Court which is a Court trying the suits under sec. 28 of

the Act and specially constituted under sec.28, the principles of res judicata cannot apply."

6 Mr Majmudar also relied upon another judgement of another single judge of this Court in the case of SHANTUKKUMAR V. KUMUDCHANDRA reported in 1986 (1) GLR page 232 wherein also a learned single judge took a similar view in a similar set of facts. In that case the plaintiff had filed a suit in the City Civil Court contending that the defendant was a trespasser. The defendant filed written statement contending that he was tenant. The City Civil Court proceeded with the matter and accepted the contention of the plaintiff that the defendant was a trespasser. Being aggrieved by that order first appeal was filed and in that appeal the learned judge took the view that the city civil court had no jurisdiction at all to decide the matter before it in view of the written statement filed by the defendant.

7 With due respect to both the learned judges, the propositions laid down cannot be accepted for the simple reason that they are contrary to the law laid down by a Division Bench as also by the Hon'ble Supreme Court. As far as the first judgement referred to above (Ambalal Bhailalbai v. Narmada) is concerned, much prior thereto, a Division Bench of the Bombay High Court (per Chagla, C.J. as he then was) in the case of GOVINDRAM V. DHARAMPAL reported in AIR 1951 Bombay 390 had in terms held that it cannot be suggested that the plaintiff should anticipate any defence that might be taken up by a defendant that he is a tenant. The initial jurisdiction which an ordinary civil court has, to decide an issue which arises before it including the jurisdictional issue cannot be affected by any subsequent contention that might be taken up by the defendant. In para 3 and 4 of the judgement the Division Bench has observed as follows:-

"The question as to whether the defendant is a tenant or licensee is a question which is collateral and which has got to be decided before it could be said that the Act has any application at all. It is a jurisdictional question which has got to be determined in order to decide whether the particular act. in which the suit has been filed has or has not the jurisdiction to try the suit. Section 28 does not deal with jurisdictional questions which have got to be decided in limine before matters arising under the Act can be considered by the Ct. (para 4)

When a plaintiff files a suit against a deft.

alleging that he is his licensee, it is a suit which cannot be entertained and tried by the Small Causes Court because it is not a suit between a landlord and a tenant and judging by the plaint no question arises out of the Rent Control Act or any of its provisions which would have to be determined on the plaint as it stands. Equally so, in a suit so framed the only Ct. that would have jurisdiction would be the H.C. because the jurisdiction of the High Court to deal with suits against licensees has not been taken away by any provision of the Rent Control Act. It cannot be suggested that the plaintiff should anticipate any defence that might be taken up by a defendant that he is a tenant or that the initial jurisdiction which the court had or which the Court lacked should be controlled or affected by any subsequent contention that might be taken up by the defendant." (underlining supplied)

8 The reasoning given by the Division Bench is absolutely clear and lucid. In the absence of any such approach, the moment the defendant takes a stand, the Court would be ousted of its jurisdiction. The Court has to examine as to what are the jurisdictional facts raised in the particular matter and then come to the conclusion whether it has a jurisdiction or not. This judgement was not considered in the above referred decision in the case of Ambalal (supra). Once any issue is raised and that is decided between the same parties, the finding on that issue does operate as res judicata. Explanation 8 of Section 11 of the Civil Procedure Code is very clear in that behalf which reads as under:-

"Explanation VIII. An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised."

9 As far as second judgement cited by Mr Majmudar is concerned, therein the learned judge came to the conclusion that the city civil court had no jurisdiction to try and entertain that suit merely because the defendant had made a submission that he was a tenant. Prior to that decision in the case of TOPANDAS V.

GORAKHRAM GOKALCHAND reported in AIR 1964 SC 1348 the question of jurisdiction had come to be considered by the Hon'ble Supreme Court and in para 8 of the said judgement the above referred observations of the Division Bench of the Bombay High Court in Govindram's case have come to be quoted and approved. In para 7 of the said judgement the Honourable Supreme Court has quoted with approval the observations of the Full Bench of Allahabad High Court in the case of Anati v. Channu reported in AIR 1930 All 193 which read as follows:-

"The plaintiff chooses his forum and files his suit. If he establishes the correctness of his facts he will get his relief from the forum chosen. If he frames his suit in a manner not warranted by the facts, and goes for his relief on the true facts, he will have his suit dismissed. Then there will be no question of returning the plaint for presentation to the proper court, for the plaint, as framed, would not justify the other kind of court to grant him the relief ... If it is found, on a trial on the merits so far as this issue of jurisdiction goes, that the facts alleged by the plaintiff are not true and the facts alleged by the defendants are true, and that the case is not cognisable by the court, there will be two kinds of orders to be passed. If the jurisdiction is only one relating to territorial limits or pecuniary limits, the plaint will be ordered to be returned to for presentation to the proper court. If, on the other hand, it is found that having regard to the nature of the suit it is not cognizable by the class of court to which the court belongs, the plaintiff's suit will have to be dismissed in its entirety."

The Hon'ble Supreme Court had considered its own judgement in the case of Babulal Bhuramal v. Nandram Shivram reported in AIR 1958 SC 677 and quoted the observations from the said judgement which read as under:-

"Do the provisions of S. 28 cover a case where in a suit one party alleges that he is the landlord and denies that the other is his tenant or vice versa and the relief asked for in the suit is in the nature of a claim which arises out of the Act or any of the provision? The answer must be in the affirmative on a reasonable interpretation of S. 28."

Thereafter the Hon'ble Supreme Court observed as follows:-

"We agree with the High Court that these observations merely show this that in order to decide whether a suit comes within the purview of S.28 what must be considered is what the suit as framed in substance is and what the relief claimed therein is."

10 The learned single judge in Shantukkumar's case (supra) has relied upon the concurring but a separate judgement of Sarkar, J. of the Hon'ble Supreme Court and came to the conclusion that the City Civil Court had no jurisdiction at all. With utmost respect, it cannot be accepted. For the reasons stated above, the ordinary civil court does have the jurisdiction to decide the jurisdictional issue and as stated above once a finding is given on the jurisdictional issue, it will operate as res judicata under explanation VIII to Section 11 of the Civil Procedure Code.

11 It is also pertinent to note that prior to the above referred judgement in Shantukkumar's case, a Division Bench of this Court had held in Nanikram Shobraj Mills v. Kirtidev reported in (1979) GLR 469 as under:-

"The expression 'any suit or proceeding between a landlord and a tenant relating to recovery of rent or possession of any premises to which any of the provisions of this part apply' in Sec. 28(1) of the Bombay Rent Control Act would cover the premises let out, and cannot cover within its sweep the premises which are not let out but are trespassed upon by the defendant."

12 Prior to the above decision in Shantukkumar's case, there is another decision of the Hon'ble Supreme Court in the case of NATRAJ STUDIOS V. NAVRANG STUDIOS reported in (1981) 1 SCC 523 wherein the Hon'ble Supreme Court in para 18 held as follows:-

"The question whether there is relationship of landlord and tenant between the parties or such other jurisdictional questions may have to be determined by the court where it falls for determination - be it the Court of Small Causes or the ordinary Civil Court. If the jurisdictional question is decided in favour of

the Court of exclusive jurisdiction the suit or proceeding before the ordinary Civil Court must cease to the extent its jurisdiction is ousted."

13 For the reasons stated above, the finding the appellate court on the first issue will have to be interfered with. It will have to be held that the suit in the Small Causes Court was barred by res judicata. A single judge of the Bombay High Court has held in Badriprasad vs. Premier Garage reported in 1980 (1) RCJ 385 that in a Revision to the High Court, the respondent has the right to support the decree of the trial court on a ground which is subsequently decided against him in Appeal. That view was taken on the basis of the provision of O.41 R.22 and para 20 of judgement of Supreme Court in the case of CHANDRA PRABHAJI JAIN TEMPLE V. HARIKRISHNA (AIR 1973 SC 2565) approving the Full Bench judgement of Madras High Court in VENKATARAO's case in AIR 1943 Madras 698. A single judge of this Court has adopted the same approach in NIRUBEN V. KIRITKUMAR R RAVAL reported in 1991 (1) GLR 390 and while deciding the issue No.1, I am adopting the same approach.

14 Mr Majmudar submitted that since I was taking a view which was contrary to the two judgements rendered by two single judges, the matter be referred to a larger Bench. He relied upon the observations of the Honourable Supreme Court in the case of Mahadeolal Kanodia v. Administrator General of W.B. reported in 1960 SC 936 which are also quoted with approval by the Hon'ble Supreme Court in the case of STATE BANK OF INDIA V. LABOUR ENFORCEMENT OFFICER (CENTRAL) reported in (1997) 10 SCC 258. In this connection what is to be noted is that as emphasised by the Hon'ble Supreme Court, rendering conflicting decisions leads to confusion and the Courts subordinate to the High Court would find themselves in an embarrassing position of having to choose between the dissentient judgements of their own High Court. There is no grievance with the proposition that a judge has to respect the judgement of the another Judge of a coordinate jurisdiction. In the instant case, both the earlier judgements have ignored the decisions of the Division Bench as well as Hon'ble Supreme Court of India. The judgement in the case of Ambalal has ignored the decisions of the Division Bench judgement reported in AIR 1951 Bom 390 which was very much holding the field at that time and which is still valid. Similarly, the judgement in Shantukkumar's case has not only ignored the Division Bench judgement reported in AIR 1951 Bom 390 but

has not considered the ratio of the judgement of the Hon'ble Supreme Court in the case of Topandas and has ignored the judgement of the Hon'ble Supreme Court in the case of Natraj Studios as also another Division Bench judgement in the case of Nanikram (supra). In the circumstances, the proper course will have to be to state that those decisions of the learned judges are erroneous. There is no need to refer the matter to a Division Bench when the law is well settled by a Division Bench judgement as well as by the Hon'ble Supreme Court. In the circumstances, all these revision applications are rejected and interim orders are vacated. RULE is discharged in each matter. There will be no order as to costs.

15 The last submission of Mr Majmudar was to request for time to vacate the premises concerned. He submits that the petitioners are in occupation of these concerned premises for more than 20 years. It is however clear that they are held to be trespassers by competent courts and that judgement of the city civil court has been confirmed by this Court much earlier, in spite of which, they are continuing on the particular premises. Still, with a view to afford them an opportunity to find alternative premises, the petitioners will not be evicted from the premises concerned until 15.5.1999. That is because, by that time examinations of school children, if any, will also be over. The time until then, in my view, is sufficient enough for the petitioners to search for / alternative premises to which they can shift immediately either before or after 15.5.1998 and in any case before onset of monsoon. The above extension is on the condition that the petitioners will file a usual undertaking before this Court within four weeks i.e. by 15.9.1998 wherein they will state that (i) they will peacefully hand over the possession of the premises to the respondents at the end of period given to them; (ii) they will not create any third party rights nor will they induct anybody into these premises and (iii) they will continue to comply with all their obligations as occupants.

(mohd)